IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

ANTHONY A. ANDERSON,
Master Sergeant (E-7),
United States Air Force,
Appellant.

USCA Dkt. No. 22-0193/AF

Crim. App. Dkt. No. 39969

BRIEF ON BEHALF OF APPELLANT

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Index

Table of Authorities

United States Constitution

Statutes

Cases

Supreme Court of the United States

Court of Appeals for the Armed Forces

Court of Military Appeals

Courts of Criminal Appeals /Courts of Military Review

Federal Circuit Courts of Appeals

State Courts

Manual for Courts-Martial, United States (2019 ed.)

Miscellaneous

Issue Presented

WHETHER APPELLANT WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE SIXTH AMENDMENT, THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE, AND THE FIFTH AMENDMENT'S RIGHT TO EQUAL PROTECTION.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (CCA) had jurisdiction over this matter pursuant to Article 66(d), Uniform Code of Military Justice [UCMJ]; 10 U.S.C. § 866(d) (2019). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), 10 U.S.C. § 867(a)(3) (2019).

Statement of the Case

On March 3, May 22, and June 1-3, 2020, Master Sergeant [MSgt] Anthony Anderson [Appellant] was tried at Ramstein Air Base, Germany, before a general court-martial composed of officer and enlisted members. Contrary to his pleas, Appellant was convicted of attempted sexual abuse of a child on divers occasions (two specifications), in violation of Article 80 of the UCMJ; 10 U.S.C. § 880 (2016 and 2019). JA at 030. Appellant elected sentencing by the military judge, who sentenced Appellant to confinement for twelve months for each offense (to run concurrently), reduction to E-1, and a dishonorable discharge. JA at 030-031. On August 4, 2020, the convening authority took no action on the findings or sentence. JA at 029.

On March 25, 2022, the CCA addressed each of Appellant's six assigned errors and affirmed the findings and sentence. *United States v. Anderson*, No. ACM 39969, 2022 CCA LEXIS 181 (A.F. Ct. Crim. App. Mar. 25, 2022) (unpub. op.). JA at 001.

Statement of Facts

Background

Appellant was charged with (1) attempted sexual abuse of a child, on divers occasions, by intentionally communicating to "Sara_2005" indecent language via communication technology; and (2) attempted sexual abuse of a child, on divers occasions, by engaging in indecent conduct by displaying his genitalia through his clothing, intentionally done in the presence of "Sara_2005" via communication technology. JA at 027.

Motion for a Unanimous Verdict

Before trial, the Defense moved for the court "to require a unanimous verdict for any finding of guilty and to modify the instructions accordingly, to wit: "provide an instruction that the President must announce whether any finding of guilty was or was not the result of a unanimous vote without stating any numbers or names." JA at 034. The Defense asserted that, in light of the Supreme Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), Appellant was entitled to a unanimous verdict under the Sixth Amendment and the Due Process and Equal

Protection clauses of the Fifth Amendment. JA at 034. The Government opposed the motion. JA at 061.

The Military Judge's Ruling

The military judge denied the motion in a written ruling supplemented after the court-martial adjourned. JA at 078, 098. The military judge noted that *Ramos* does not address courts-martial, nor does it explicitly or implicitly overrule prior Supreme Court precedent regarding the inapplicability of the Sixth Amendment jury trial right to courts-martial. JA at 104-05. The military judge determined that *Ramos* "does not impact existing C.A.A.F. precedent holding there is no Sixth Amendment right to a 'jury trial' in the military context" because an accused's right to trial by members at court-martial derives from statute, *i.e.*, Article 29, UCMJ, 10 U.S.C. § 829. JA at 105.

The military judge concluded that any due process considerations weighing in favor of unanimous verdicts were not "so extraordinarily weighty as to overcome the balance struck by Congress" in Article 52, UCMJ, 10 U.S.C. § 852, in light of the "specific military conditions" favoring the finality of verdicts and the avoidance of unlawful command influence. JA at 106-07. He found that the non-unanimity requirement did not implicate a suspect classification, and a unanimous verdict in a jury trial was not a fundamental right guaranteed at a court-martial because the right to a jury trial did not apply to court-martial panels. JA at 108.

The military judge concluded that if such a fundamental right applied, the Article 52, UCMJ, provision for non-unanimous verdicts would survive either rational basis review or heightened scrutinty by the courts. JA at 108.

Appellant's Forum Rights, Election of Forum, and Plea

The military judge advised Appellant that he had the right to be tried by a court consisting of eight members and that, if he elected trial by members, three-fourths of the members must vote to convict him. JA at 112. Appellant pled not guilty to the Charge and its Specifications and elected to be tried by a panel of officer and enlisted members. JA at 113-14. The panel consisted of eight members – five officer members and three enlisted members. JA at 129.

The Military Judge's Instructions

During voir dire, the military judge instructed the panel that the Government bore the burden of proving Appellant's guilt beyond a reasonable doubt. JA at 116, 123.

After the parties' closing arguments, the military judge provided procedural instructions to the members, including that "the influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment" and "[t]he concurrence of at least three-fourths of the members present when the vote is taken

is required for any finding of guilty. Since we have eight members, that means six members must concur in any finding of guilty." JA at 094, 131.

Findings of the Court-Martial

The panel convicted Appellant of both specifications. JA at 134. It is unclear how many members concurred in the findings as the members' vote was not disclosed. JA at 134.

The CCA Decision

Appellant appealed the military judge's denial of the motion for a unanimous verdict. JA at 007. In affirming the military judge's decision, the CCA correctly restated *Ramos'* holding that the Sixth Amendment's guarantee of the right to trial "by an impartial jury" required a unanimous verdict in state and federal criminal trials. JA at 022 (quoting *Ramos*, 140 S. Ct. at 1396-97). Next, the CCA dismissed Appellant's argument that the Sixth Amendment requires unanimous verdicts in trials by courts-martial with members:

> [T]he essence of the Court's opinion is to explain that the jury required by the Sixth Amendment is one that renders a unanimous verdict. *Ramos* does not purport, explicitly or implicitly, to extend the scope of the Sixth Amendment right to a jury trial to courts-martial; nor does the majority opinion in *Ramos* refer to courts-martial at all. Accordingly, after *Ramos*, this court remains bound by the plain and longstanding precedent from our superior courts that the Sixth Amendment right to a jury trial does not apply to courts-martial – and, by extension, neither does the unanimity requirement announced in *Ramos*.

JA at 022.

Citing three of its own unpublished decisions, all decided pre-*Ramos*, the CCA concluded that the Fifth Amendment Due Process clause did not require unanimous verdicts in courts-martial. JA at 023. The CCA asserted:

> We are similarly unconvinced that the factors weighing in favor of a heretofore unrecognized unanimity requirement in courts-martial are so extraordinarily weighty as to override Congress's determination that a three-fourths vote strikes the correct balance of competing considerations in the administration of military justice, potentially including the prevention of unlawful command influence and securing finality of verdicts.

JA at 023.

Finally, the CCA found no Fifth Amendment equal protection violation because Article 52, UCMJ, "does not implicate a suspect classification." JA at 023. The CCA declared that "a servicemember standing trial in a court-martial is not similarly situated to a civilian accused in this respect, and the unanimity requirement announced in *Ramos* is not a 'fundamental right' afforded to the former." JA at 023. Accordingly, Article 52, UCMJ, is subject to rational basis review. JA at 023. The CCA concluded that Appellant failed to meet the burden to demonstrate that no plausible reason exists for the three-fourths provision. JA at 023.

Summary of Argument

Two years ago, the Supreme Court guaranteed the right to a unanimous verdict to all state court defendants. *Ramos*, 140 S. Ct. 1390. Defendants prosecuted in federal court already enjoyed this right vis-à-vis the Sixth Amendment. Following *Ramos*, a court-martial is the *only* forum where a defendant can be tried and convicted of a serious offense by a non-unanimous finding of guilty.

In incorporating the Sixth Amendment jury-unanimity right to the states, the Supreme Court found that the term "trial by an impartial jury" meant that "[a] jury must reach a unanimous verdict to convict." 140 S. Ct. at 1395. In *United States v. Lambert*, this Court held that "the Sixth Amendment requirement that the jury be *impartial* applies to court-martial members" and this requirement covers "their conduct during the trial proceedings and the *subsequent deliberations*." 55 M.J. 293, 294 (C.A.A.F. 2001) (emphasis added). Because the Supreme Court explicitly equated the term impartial with unanimity, and in light of this Court's holding in *Lambert*, it is apparent that, following *Ramos*, a non-unanimous guilty verdict at a court-martial cannot be impartial. As such, servicemembers have a constitutional right to be convicted by a unanimous verdict under the Sixth Amendment and this Court's jurisprudence.

Additionally, servicemembers have the right to a unanimous verdict under the Fifth Amendment's Due Process Clause and the Fifth Amendment's right to equal protection of the laws. The jury-unanimity right announced in *Ramos* was heralded as "vital," "essential," "indispensable," and as being "fundamental to the American scheme of justice." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1573 (Kagan, J., dissenting); *Ramos*, 140 S. Ct. at 1397. Given this emphatic language, it is clear that the jury-unanimity right enshrined in *Ramos* is a fundamental right incorporated to the states pursuant to the Fourteenth Amendment *because* this right was both "fundamental to [the American] scheme of ordered liberty" and "deeply rooted in our Nation's history and tradition." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010).

For servicemembers charged with serious offenses under the UCMJ, "the factors militating in favor of [requiring a unanimous verdict] are so extraordinarily weighty as to overcome the balance struck by Congress.'" *Weiss v. United States,* 510 U.S. 163, 177-78 (1994). Because a unanimous verdict and the burden of proof beyond a reasonable doubt are inextricably intertwined, a non-unanimous verdict demonstrates that the Government has failed to prove a servicemember guilty beyond a reasonable doubt. As such, a system of non-unanimous verdicts "sanctions the conviction at trial or by guilty plea of some defendants who might

not be convicted under the proper constitutional rule[.]" *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring).

Lastly, in *Ortiz v. United States*, the Supreme Court recognized that the "essential character" of the military justice system is "judicial," stating "[t]he procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal." 138 S. Ct. 2165, 2174 (2018). It emphasized that "[t]he sentences meted out [by a court-marital panel] are also similar," as a court-martial can impose "terms of imprisonment and capital punishment." *Id.* at 2175. Servicemembers may also be tried for a "for a vast swath of offenses, including garden-variety crimes unrelated to military service." *Id*. at 2174. Therefore, as elucidated in *Ortiz*, military servicemembers and federal and state defendants are "in all relevant respects alike." *United States v. Begani,* 81 M.J. 273, 280 (C.A.A.F. 2021), *cert. denied*, 142 S. Ct. 711 (2021). Nonetheless, servicemembers are denied a fundamental right guaranteed to their civilian brethren. Because servicemembers are similarly situated to their civilian counterparts, servicemembers are entitled to a unanimous verdict to ensure equal protection of the law.

Argument

APPELLANT WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE SIXTH AMENDMENT, THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE, AND THE FIFTH AMENDMENT'S RIGHT TO EQUAL PROTECTION.

Standard of Review

The constitutionality of a statute is a question of law reviewed de novo. *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000).

Law and Analysis

Article I, Section 8 of the Constitution provides, "The Congress shall have Power . . . To make Rules for the Government and Regulation of the Land and naval Forces." The courts will generally defer to Congress when it legislates on military affairs. *See, e.g.*, *Solorio v. United States*, 483 U.S. 435 (1987). In *Solorio*, the Supreme Court stated, "The rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress." *Id*. at 440 (1987) (citation omitted). The Court further noted:

> Congress has primary responsibility for the delicate task of balancing the rights of [servicemembers] against the needs of the military. As we recently reiterated, "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and

> make rules and regulations for their governance is challenged."

Id. at 447 (omission in original)

The Sixth Amendment guarantees an impartial jury in all criminal prosecutions. U.S. Const. amend. VI. Section 1 of the Fourteenth Amendment prohibits states from depriving any person of life, liberty, or property without due process of law and from denying any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV.

The Fifth Amendment guarantees the due process of law to anyone subject to the deprivation of life, liberty, or property in a criminal proceeding. U.S. Const. amend. V. The due process clause also prohibits the federal government from discriminating if the discrimination is so unjustifiable that it violates due process of law. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

Article 52(a)(3), UCMJ, 10 U.S.C. § 852(a)(3), provides for non-unanimous guilty verdicts in trials by courts-martial with members.[1] It requires only "the concurrence of at least three-fourths of the members present when the vote is taken." A trial by court-martial requires eight members in a general court-martial and four members in a special court-martial. Article 16(b)(1), (c)(1), UCMJ, 10 U.S.C. § 816(b)(1), (c)(1). However, "[a]fter impanelment, as a result of excusals,

[1] In capital cases, however, the UCMJ requires a unanimous verdict to convict and for a sentence of death. *See* Article 52(b)(2), UCMJ, 10 U.S.C. § 852(b)(2).

[a general-court martial panel] could be reduced to no fewer than six members." Dept of the Army Pamphlet 27-9, Military Judges' Benchbook (Feb. 29, 2020) [Benchbook], para. 2-1-3. Therefore, as few as six members, needing only a three-fourths concurrence for a finding of guilty, may determine a servicemember's fate.

In *Ramos*, decided in April 2020 before Appellant's trial on the merits, the Supreme Court "repudiated [its] 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which had allowed non-unanimous juries in state criminal trials." *Edwards*, 141 S. Ct. at1551. In delivering the Court's opinion, Justice Gorsuch explained:

> The text and structure of the Constitution clearly suggest that the term "trial by an impartial jury" carried with it some meaning about the content and requirements of a jury trial.
>
> One of these requirements was unanimity. Wherever we might look to determine what the term "trial by an impartial jury" meant at the time of the Sixth Amendment's adoption – whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward – the answer is unmistakable. A jury must reach a unanimous verdict to convict.

Ramos, 140 S. Ct. at 1395. Furthermore, "the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice,' such that "[t]here can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally." *Id*. Justice Thomas reiterated the

fundamental nature of the right to a unanimous guilty verdict, declaring, "It is within the realm of permissible interpretations to say that 'trial . . . by . . . jury' [in the Sixth Amendment] includes a protection against nonunanimous felony guilty verdicts." *Id*. at 1423 (Thomas, J., concurring).[2]

Ramos held that, by way of the Fourteenth Amendment's Due Process Clause, the Sixth Amendment's jury-unanimity rule is "no less" applicable to state convictions for criminal offenses as it is to federal convictions. 140 S. Ct. at 1397. While the "jury-unanimity requirement announced in *Ramos* was not dictated by precedent or apparent to all reasonable jurists" prior to *Ramos*, that decision unequivocally broke "momentous and consequential" new ground. *Edwards*, 141 S. Ct. at 1555-56, 1559. Lest there be anyone who failed to appreciate the "momentous and consequential" new ground broken in *Ramos*, *Edwards* made clear that *Ramos* belongs to the canon of "landmark" criminal procedure cases which includes "*Mapp*, *Miranda*, *Duncan*, *Batson*, [and] *Crawford*. . . ." *Id*. at 1559.[3] These cases "fundamentally reshaped criminal procedure throughout the

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[2] Justice Thomas agreed with the majority that Ramos' non-unanimous felony conviction was unconstitutional but would have applied the right to a unanimous guilty verdict through the Privileges or Immunities Clause of the Fourteenth Amendment. *Ramos*, 140 S. Ct. at 1420-21 (Thomas, J., concurring).

[3] *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Crawford v. Washington*, 541 U.S. 36 (2004).

United States and significantly expanded the constitutional rights of criminal defendants." *Id*.

In dissenting from the *Edwards'* holding, which declined to retroactively apply *Ramos*, Justice Kagan elaborated on the "vital," "essential," "indispensable," and "fundamental" right to a unanimous jury verdict:

> Allowing conviction by a non-unanimous jury impairs the purpose and functioning of the jury, undermining the Sixth Amendment's very essence. It raises serious doubts about the fairness of a trial. And it fails to assure the reliability of a guilty verdict. So when a jury has divided, as when it has failed to apply the reasonable-doubt standard, there has been no jury verdict within the meaning of the Sixth Amendment.

Id. at 1573-74, 1577 (Kagan, J., dissenting) (alterations, internal quotation marks, and citations omitted).

"[T]he [*Ramos*] Court took the unusual step of overruling precedent for the most fundamental of reasons: the need to ensure, in keeping with the Nation's oldest traditions, fair and dependable adjudications of guilt." *Id*. at 1575 (Kagan, J., dissenting). Non-unanimous guilty verdicts deprive servicemembers not only of a fundamental right, but also of an essential procedural safeguard ensuring a fair and dependable adjudication. Through Article 52(a)(3), UCMJ, Congress denies servicemembers this foundational, fundamental tenet of American justice for no articulated reason, let alone a legitimate or compelling Government interest.

Convictions by non-unanimous guilty verdicts "raise[] serious doubts about the fairness of [a] trial" and they fail to "assure the reliability of [a guilty] verdict." *Brown v. Louisiana*, 447 U.S. 323, 334, n. 13 (1979). Thus, a servicemember, such as Appellant, who exercises his statutory right to be tried by a panel has a constitutional right for that factfinder to convict him unanimously – whether under the Sixth Amendment, the Due Process Clause of the Fifth Amendment, or the Equal Protection Clause of the Fifth Amendment.

"Although an accused tried by a court-martial has no Sixth Amendment right [to a jury trial], he does possess a due process right to a fair and impartial factfinder. Statutes and rules of procedure must be interpreted in the light of – and, if necessary, must yield to – this guarantee." *United States v. Carter*, 25 M.J. 471, 473 (C.M.A. 1988) (citations omitted). Since 1964, this Court and its predecessor have consistently concluded that, where servicemembers elect to be tried by a panel, they have a constitutional right to a panel that is impartial. *United States v. Crawford*, 35 C.M.R. 3, 6 (C.M.A. 1964); *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005); *see also, e.g., United States v. Deain*, 17 C.M.R. 44, 49 (C.M.A. 1954) ("Fairness and impartiality on the part of the triers of fact constitute a cornerstone of American justice.").

Here, in dismissing Appellant's assertion of the right to a unanimous verdict under *Ramos*, the CCA asserted:

> the essence of [*Ramos*] is to explain that the jury required by the Sixth Amendment is one that renders a unanimous verdict. *Ramos* does not purport, explicitly or implicitly, to extend the *scope* of the Sixth Amendment right to a jury trial to courts-martial; nor does the majority opinion in *Ramos* refer to courts-martial at all. Accordingly, after *Ramos*, this court remains bound by the plain and longstanding precedent from our superior courts that the Sixth Amendment right to a jury trial does not apply to trial by courts-martial – and, by extension, neither does the unanimity requirement announced in *Ramos*.

JA at 022 (emphasis in original).

The CCA is correct that *Ramos* does not refer to courts-martial, but the question of whether trials by courts-martial require a unanimous verdict to convict was not the question before the Supreme Court. The question before the Supreme Court was whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous jury verdict to convict. *Ramos*, 140 S. Ct. 1394. Had the Supreme Court "refer[red] to courts-martial" in a case about the application of the Sixth Amendment to state criminal convictions, it would have amounted to an advisory opinion, *i.e.*, "an opinion issued by a court on a matter that does not involve a justiciable case or controversy between adverse parties." *United States v. Wall*, 79 M.J. 456, 461 (C.A.A.F. 2020); *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003)). Article III courts are precluded from issuing advisory opinions and this Court, along with the CCAs, "generally adhere to the prohibition on advisory opinions as a prudential matter." *Id.* (citing

U.S. Const., Art. III, § 2; Laurence H. Tribe, *American Constitutional Law* § 3-9, at 328-30 (3d ed. 2000)). Accordingly, the Supreme Court's decision not to opine on a case or controversy not before that court is not dispositive, contrary to the CCA's reasoning.

Until 2020, it was presumed that the Sixth Amendment guarantee of a unanimous verdict did not apply to criminal convictions in state courts. The presumption was so embedded that the jury unanimity requirement announced in *Ramos* "was not dictated by precedent or apparent to all reasonable jurists" prior to *Ramos*. *Edwards*, 141 S. Ct. at 1555-56. Here, the presumption that the Sixth Amendment jury-unanimity right does not apply to courts-martial is similarly embedded. *See, e.g., United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (in discussing when jeopardy attaches in the military context, this Court has stated, "In addition, there is no Sixth Amendment right to trial by jury in courts-martial.")[4] (citations omitted); *United States v. Pritchard*, __M.J. __, ARMY MISC. 20220001, 2022 CCA LEXIS 349 (A. Ct. Crim. App. Jun. 9, 2022) (*en banc*); *United States v. Causey*, 82 M.J. 574 (N-M. Ct. Crim. App. 2022), *rev. granted*, 2022 CAAF LEXIS 557 (C.A.A.F. Aug. 3, 2022); *United States v.*

[4] Given that the constitutional question in *Easton* concerned when jeopardy attaches in the military context under Article 44, UCMJ, this Court's statement that "there is no Sixth Amendment right to trial by jury in courts-martial" is dicta and not the holding of *Easton*.

Westcott, No. ACM 39936, 2022 CCA LEXIS 156, *6 (A.F. Ct. Crim. App. Mar. 17, 2022) (unpub. op.), *rev. denied*, 2022 CAAF LEXIS 522 (C.A.A.F. Jul. 21, 2022).[5]

Much of this Court's jurisprudence on the right to a Sixth Amendment "jury trial" focuses on the lack of a right to a "representative cross-section" of the accused's community. *See, e.g., United States v. Riesbeck*, 77 M.J. 154, 162 (C.A.A.F. 2018) (citation omitted); *Easton*, 71 M.J. at 175-76; *United States v. Tulloch*, 47 M.J. 283, 285 (C.A.A.F. 1997); *United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988). In other words, a military accused is not entitled to a jury of his or her peers by virtue of Article 25, UCMJ, which provides, *inter alia*, that panel members must be superior in rank to the accused and that the convening authority shall detail members who are "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

While a jury-unanimity requirement was not dictated by precedent or apparent to all reasonable jurists of this Court and of the CCAs pre-*Ramos*, the "fundamental right" announced in *Ramos* now applies to courts-martial. This is because *Ramos* turns the presumption that the Constitution does not require unanimous verdicts for non-capital courts-martial on its head by making clear that (1) it is the Sixth Amendment's right to an *impartial* jury that requires unanimity;

[5] JA at 199.

and (2) this unanimity is inextricably linked to the *fundamental fairness* of a verdict. In two pre-*Ramos* decisions, this Court recognized that "[a]s a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001); *see also Richardson*, 61 M.J. at 118. Thus, whether under the Sixth Amendment or the Fifth Amendment, Congress' choice to provide a statutory right to trial by a panel necessarily triggered constitutional requirements of fairness and impartiality. Following *Ramos*, these requirements are not satisfied by non-unanimous convictions.

The military judge's failure to require a unanimous verdict following *Ramos* violated Appellant's rights under the Sixth and Fifth Amendments. Because the error was of constitutional dimension, the Government bears the burden of proving that the error was harmless beyond a reasonable doubt. *United States v. Tovarchavez*, 78 M.J. 458 (C.A.A.F. 2019). Because it cannot do so, Appellant is entitled to relief.

1. Under *Ramos*, unanimous verdicts are central to an accused's Sixth Amendment right to a jury trial *and* to an impartial jury.

In *Ramos*, Justice Gorsuch explained that the Founders understood that unanimity was central to the right to a petit, or trial, jury in a criminal case and to the right to an impartial jury, which, unlike unanimity, the text of the Sixth Amendment expressly requires. *See Ramos*, 140 S. Ct. at 1395-97. "Wherever we

might look to determine what the term 'trial by an *impartial* jury' meant at the time of the Sixth Amendment's adoption – whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward – the answer is unmistakable. A jury must reach a unanimous verdict in order to convict." *Id*. at 1395 (emphasis added). This requirement is necessary because "a jurisdiction adopting a nonunanimous jury rule, even for benign reasons, would still violate the Sixth Amendment." *Id*. at 1401, n.44.

Ramos did not just overrule *Apodaca* and incorporate the unanimous verdict requirement against the states; it also reinforced that unanimous juries are essential to the Constitution's separate guarantees of impartial juries and fair verdicts. In overruling *Apodaca*, "[t]he Court took the unusual step of overruling precedent for the most fundamental of reasons: the need to ensure, in keeping with the Nation's oldest traditions, fair and dependable adjudications of a defendant's guilt." *Edwards*, 141 S. Ct. at 1575 (Kagan, J., dissenting). This Court has also recognized:

> [t]he right to a trial by an *impartial panel* lies at the *very heart of due process*. Our common-law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose – to provide a *fair and reliable* determination of guilt.

United States v. Commisso, 76 M.J. 315, 321 (C.A.A.F. 2017) (citation omitted) (emphasis added). Thus, even if Appellant did not have a constitutional right to a

trial by petit jury, the Constitution nonetheless required that, once he was tried by the factfinder that Congress chose to provide him, any conviction must be unanimous in order to guarantee a fair and impartial trial. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (explaining why, even if a criminal defendant has only a statutory, as opposed to constitutional, right to appeal, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution"); *accord United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985) (explaining that a military criminal appeal is a statutory right that, once granted, must comport with safeguards of constitutional due process). When synthesizing Appellant's statutory right to be tried by a panel with the requirement that such statutory right must comport with the Constitution, *Ramos* establishes that Appellant's constitutional right to a fair and impartial panel requires that guilty verdicts be unanimous.

2. This Court has recognized that the UCMJ and the Rules for Courts-Martial create statutory and constitutional rights for an accused who elects to be tried by members.

"'[A] court-martial is now the only place in America where a criminal defendant can be convicted without consensus among the jury.'" *Westcott*, 2022 CCA LEXIS 156, at *117 (Meginley, J., dissenting) (quoting Capt. Nino Monea, Reforming Military Juries in the Wake of *Ramos v. Louisiana*, 66 Naval L. Rev. 67, 72 (2020)). Virtually all the other provisions of the Sixth Amendment, aside

from the Vicinage Clause, have already been incorporated into the military justice system. In *Lambert*, this Court was presented with the question of whether, after the accused learned that a member introduced a fiction book called "Guilty As Sin" into the deliberation room, the military judge erred in failing to adequately voir dire the members and in prohibiting the defense from conducting voir dire of the members. 55 M.J. at 294. After stating that an accused has no Sixth Amendment right to a jury trial, this Court focused on an accused's right to an impartial jury: "*[T]he Sixth Amendment* requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and *the subsequent deliberations*." *Id*. (emphases added). Thus, for 21 years, this Court has explicitly recognized that an accused is entitled to an impartial factfinder, including when the factfinder is a panel composed of members. Despite *Lambert's* clear application of the Sixth Amendment's guarantee of impartiality to a court-martial panel, the CCA failed to even mention *Lambert* when it conducted its analysis of Appellant's right to a unanimous verdict. JA at 021-022. Instead, the CCA claimed:

> Accordingly, after *Ramos*, this court remains bound by the plain and longstanding precendent from our superior courts that the Sixth Amendment right to a jury trial does not apply to courts-martial – and, by extension, neither does the unanimity requirement announced in *Ramos*.

JA at 022.

Following *Ramos*, an impartial court-martial panel is a logical fallacy, unless that panel, acting as the factfinder, returns a unanimous verdict to convict. Furthermore, the Supreme Court is a court superior to the CCA.

Lambert is but one case in which this Court has extended Sixth Amendment protections to courts-martial:

a. Right to Speedy Trial: "In the military justice system, an accused's right to speedy trial flows from various sources, including the Sixth Amendment, Article 10 of the [UCMJ], and RCM 707 of the Manual for Courts-Martial." *United States v. Cooper*, 58 M.J 54, 57 (C.A.A.F. 2003).

b. Right to Public Trial: "Without question, the [S]ixth [A]mendment right to a public trial is applicable to courts-martial." *United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985) (citation omitted).

c. Right to Confront: "We hold that where testimonial hearsay is admitted, the Confrontation Clause is satisfied only if the declarant of that hearsay is either (1) subject to cross-examination at trial, or (2) unavailable and subject to previous cross-examination." *United States v. Blazier*, 69 M.J. 218, 222 (C.A.A.F. 2010).

d. Right to Notice:

> The rights at issue in this case are constitutional in nature. The Fifth Amendment provides that no person shall be deprived of life, liberty, or property, without due process of law," U.S. Const. amend. V. The Sixth Amendment

> provides that an accused shall "be informed of the nature and cause of the accusation," U.S. Const. amend. VI. Both amendments ensure the right of an accused to receive fair notice of what he is being charged with.

United States v. Girouard, 70 M.J. 5, 10 (C.A.A.F. 2011) (citations omitted).

e. Right to Compel: "The right to present a defense has many aspects. Under the Compulsory Process Clause, a defendant has a 'right to call witnesses whose testimony is material and favorable to his defense.'" *United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016) (citation omitted).

f. Right to Counsel: "The first question we address is when did appellant's right to counsel under the [S]ixth [A]mendment attach. . . . In the military, this [S]ixth [A]mendment right to counsel does not attach until preferral of charges." *United States v. Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985) (citations omitted).

g. Right to the Effective Assistance of Counsel: "The Sixth Amendment guarantees a criminal accused, including military service members, the right to effective assistance of counsel." *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011) (citation omitted).

The above sample of cases makes clear that, notwithstanding the deference afforded to Congress to legislate on military matters, courts – including this Court – have applied certain constitutional protections to courts-martial. These constitutional protections include jury-specific constitutional rights. *See Lambert*, 55 M.J. at 295 (regarding the Sixth Amendment right to an impartial panel);

Wiesen, 56 M.J. at 174 (regarding the Fifth Amendment due process right to a fair and impartial panel); *Richardson*, 61 M.J. at 118 ("As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel.").

3. The Fifth Amendment Due Process Clause requires unanimous verdicts for serious offenses.

The Fifth Amendment also guarantees Appellant the right to a unanimous guilty verdict. In *Ramos*, five justices expressly held that the due process principle of incorporation is what required Louisiana to afford the right of a unanimous verdict to defendants in state court. In *McDonald*, the Supreme Court explained that, in order for a Bill of Rights guarantee to be incorporated at all, the hallmark question is whether such a right is fundamental to the American scheme of ordered liberty or is deeply rooted in our Nation's history and tradition. 561 U.S. at 767.[6]

In *Ramos*, the Court announced that there "can be no question the Sixth Amendment's unanimity requirement applies to state and federal trials equally," that the Sixth Amendment's guarantee to a jury trial "is fundamental to the American scheme of justice," and is "incorporated against the States." 140 S. Ct. at 1397. The Court also labeled this right an "ancient guarantee," and explained that "the right to trial by jury *included* a right to a unanimous verdict," at the time

[6] In *McDonald*, the Court held that the Second Amendment right to bear arms was incorporated against the states. 561 U.S. at 748.

of the Sixth Amendment's adoption. *Id.* at 1402 (emphasis in original). With these pronouncements, the Court implicitly recognized that due process of law as applied to the states by the Fourteenth Amendment guarantees the right to a unanimous verdict. This is how the Sixth Amendment right to a unanimous verdict is protected by due process.[7] Accordingly, because "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs and that Clause provides some measure of protection to defendants in military proceedings,"[8] the non-unanimous verdict system established by Article 52, UCMJ, fails to pass constitutional muster.

In *United States v. Santiago-Davila*, this Court's predecessor held that if a right applies because of due process, "it applies to courts-martial, just as it does to civilian juries." 26 M.J. 380, 390 (C.M.A. 1988). In *Santiago-Davila*, that meant applying *Batson*[9] to courts-martial. Furthermore, a unanimous verdict is part and parcel of the Fifth Amendment right to have one's guilt proved beyond a reasonable doubt, a right which military courts have explicitly required in courts-martial. *See United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). Just as *Batson*,

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[7] Because courts-martial are federal creatures, the Fourteenth Amendment's Equal Protection Clause applies through reverse incorporation. *See Bolling*, 347 U.S. at 499-500; *United States v. Meakin*, 78 M.J. 396, 401 n.4 (C.A.A.F. 2019) (explaining the applicability of the Fourteenth Amendment to the military through the Fifth Amendment).
[8] *Weiss*, 510 U.S. at 176.
[9] 476 U.S. 79.

Miranda, *Crawford*, *Duncan*, and *Mapp* apply to courts-martial and not just civilian criminal defendants, so, too, does *Ramos*. To suggest that servicemembers do not enjoy a right to a unanimous guilty verdict, but enjoy other, equally fundamental Fourth, Fifth, and Sixth Amendment rights leads to a fundamentally unfair result. In *Hibdon v. United States*, the Sixth Circuit reiterated:

> [t]he unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms.

204 F.2d 834, 838 (6th Cir. 1953).

Appellant's case presents an even more glaring deprivation of due process than that which Louisiana or Oregon sanctioned prior to *Ramos*. The schemes in those states utilized a twelve-member jury and required a minimum of ten votes to convict. The pool from which the defense could obtain a not-guilty verdict was larger than Appellant's in two ways: (1) the jurors were drawn from a cross-section of the community, as opposed to the members selected by the convening authority pursuant to Article 25, UCMJ; and (2) twelve members served on the jury, as opposed to the eight-member panel in Appellant's trial. From a statistical perspective, the civilian defendants enjoyed a greater benefit than an accused facing trial by court-martial; in Louisiana and Oregon, a prosecutor would need to

convince approximately 83% of the jury to convict, but in the military justice system, a prosecutor need only convince 75% of the panel to convict an accused.

An accused at a court-martial is due the same right as civilian defendants to have the Government prove its case beyond a reasonable doubt. *See United States v. Gay*, 16 M.J. 475, 477 (C.M.A. 1983) ("Due process requires proof beyond a reasonable doubt for conviction of a crime.") (citation omitted). Federal civilian courts have long recognized the nexus between this right and the requirement of jury unanimity as to guilt. *See Billeci v. United States*, 184 F.2d 394 (D.C. Cir. 1950) ("An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only one of them fixedly has a reasonable doubt, a verdict of guilty cannot be returned."); *Hibdon*, 204 F.2d at 838.

Unanimity is central to an accused's due process right to have the Government prove its case beyond a reasonable doubt. *See Gay*, 16 M.J. at 477. As noted by two concurring justices in *Ramos*, allowing a non-unanimous guilty verdict "sanctions the conviction" of some defendants,[10] who would otherwise defeat the State's efforts "to [meet] its burden" of proving guilt. *Id.* at 1410-12 (Sotomayor, J., concurring).

[10] 140 S. Ct. at 1417 (Kavanaugh, J., concurring).

Whereas in the unconstitutional systems previously employed in Louisiana and Oregon, a prosecutor needed to obtain ten votes to convict, in the military an accused facing a non-capitally referred court-martial is not even entitled to ten votes. Therefore, the need for unanimity is especially important in the military justice system because from a pure mathematics perspective, the military's smaller panels make it easier for the prosecution to obtain the requisite number of votes (*i.e.*, establish proof beyond a reasonable doubt) with an eight-member panel. Additionally, servicemembers are denied a panel of their peers; instead, they are entitled to a panel of "the best qualified for the duty" according to the convening authority pursuant to Article 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2). A Department of Defense report observed that the "best qualified" criteria under Article 25(d)(2)

> ensures the highest caliber personnel [are] available to serve as court-martial members. This represents a significant protection for the accused. Moreover, the "best qualified" court-martial members presumably reach fair and accurate verdicts more efficiently.

United States v. Benedict, 55 M.J. 451, 458 (C.A.A.F. 2001) (Effron, J., dissenting) (citing Department of Defense, Joint Service Committee on Military Justice, Report on the Method of Selection of Members of the Armed Forces to Serve on Courts-Martial (1999)).

The Government's burden of proof is unconstitutionally lowered when the Government can secure a conviction even if twenty-five percent of those who are the "best qualified" hold a reasonable doubt regarding the accused's guilt. This situation "does violence to language and logic to say that the government has proved the defendant's guilt beyond a reasonable doubt." *Johnson v. Louisiana*, 406 U.S. 356, 401 (1972) (Marshall, J., dissenting). For Justice Marshall, "[t]he doubts of a single juror are in my view evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt." *Id*. The UCMJ exacerbates that concern because one-quarter of a "best qualified" panel could be convinced of the accused's innocence, and yet this servicemember would still be found guilty.

When it comes to an accused's procedural rights in a court-martial, the relevant question under the Due Process Clause is "whether the factors militating in favor of [the right] are so extraordinarily weighty as to overcome the balance struck by Congress." *Weiss*, 510 U.S. at 177-78 (quotation and citation omitted). In *Weiss*, the petitioners challenged whether they had a right to have their courts-martial presided over by military judges with fixed terms in office. The Supreme Court held that the Due Process Clause did not require fixed terms. The Court expressly tied its analysis to the lack of a connection between fixed terms and impartiality and rejected the petitioners' claim that "a military judge who does not

have a fixed term of office lacks the independence necessary to ensure impartiality." *Id*. at 178. Additionally, the Court noted that the Due Process Clause did not require fixed terms for military judges because "it has never been a part of the military justice tradition." *Id*. at 179. However, the Court cautioned that "[w]e do not mean to say that any practice in military courts which might have been accepted at some time in history automatically satisfies due process of law today." *Id*. This statement calls to mind Justice Kagan's statement in *Edwards* that what was not apparent pre-*Ramos* – unanimous verdicts – is required today. *See* 141 S. Ct. at 1555-56 (Kagan, J., dissenting). Thus, while military courts today do not require unanimous verdicts, it is apparent post-*Ramos* that servicemembers are also entitled to unanimous verdicts.

Here, the CCA remained

> unconvinced that the factors weighing in favor of a heretofore unrecognized unanimity requirement in courts-martial are so extraordinarily weighty as to override Congress's determination that a three-fourths vote strikes the correct balance of competing considerations in the administration of military justice, potentially including the prevention of unlawful command influence and securing finality of verdicts.

JA at 023.

While the CCA was reluctant to acknowledge the factors weighing in favor of a unanimity requirement for courts-martial guilty verdicts, it summarily

concluded that such factors were insufficient to overcome the competing balance of *potential* considerations without actually analyzing those considerations.

Here, the factors militating in favor of unanimous verdicts, in addition to those already addressed, *supra*, are so extraordinarily weighty as to overcome the balance struck by Congress for the following reasons.

First, at the time the current military panel system was devised, neither *Ramos* nor *Edwards* had yet been decided and Congress would have been under the impression that non-unanimous verdicts were constitutional in other systems. Since then, the Supreme Court has roundly rejected such systems. The fact that the Supreme Court has so recently recognized the imperative nature of a unanimous verdict for the civilian population is an extraordinarily weighty factor that overcomes the balance struck by Congress. A system of non-unanimous verdicts "sanctions the conviction at trial or by guilty plea of some defendants who might not be convicted under the proper constitutional rule." *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring).

Second, Congress has already recognized the importance of unanimous verdicts in capitally referred cases and the military justice system only allows for the possibility of the death penalty when a panel of twelve members unanimously agree upon the findings. *See* RCM 1004(a)(2)(A). Thus, the military justice system already acknowledges that unanimity has a place and unanimous verdicts

are required in capital cases. In other words, the military justice system is not a stranger to the concept of unanimous verdicts. The CCA's concern about the prevention of unlawful command influence and securing finality of verdicts is not a concern in capital cases. There is no plausible argument for why these considerations are tolerable in non-capital cases but not in capital cases. An accused referred to a non-capital court-martial – who may face a sentence of life in prison[11] – is entitled to the same requirement of proof beyond a reasonable doubt by a unanimous factfinder as an accused referred to a capital court-martial.

Third, the unanimity requirement is even more important in jurisdictions, like courts-martial, that utilize panels with fewer than twelve members. *See Ballew v. Georgia*, 435 U.S. 223, 234 (1978) (noting that "the risk of convicting an innocent person [] rises as the size of the jury diminishes."). In his concurring opinion in *Ramos*, Justice Kavanaugh highlighted the "racist origins of the non-unanimous jury":

> [I]t is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving back

[11] In *United States v. Daniels*, No. ACM 39407 (rem), 2022 CCA LEXIS 472, at *1 (A.F. Ct. Crim, App. Aug. 9, 2022) (unpub. op.), the appellant was charged with negligent dereliction of duty, rape, and conduct unbecoming an officer and gentleman in violation of Articles 92, 120, and 133, UCMJ. His case was prosecuted in 2017. JA at 135. Pursuant to Article 52, UCMJ (2016 ed), only two-thirds of the members needed to concur in any finding of guilty. Notably, appellant, a black man, was accused of raping a white woman. JA at 152. As a result of his conviction for rape, he faced a maximum confinement term of life in prison. JA at 153.

> defendants, victims, or jurors. . . . Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The [other] jurors "can simply ignore the views of their fellow panel members of a different race or class."

Ramos, 140 S. Ct. at 1417-18 (Kavanaugh, J., concurring) (citation omitted).

In his concurring opinion in *Causey*, Senior Judge Gaston posited:

> Justice Kavanaugh's concerns that the use of non-unanimous verdicts can increase the possibility of unfair or unjust verdicts and the fencing out of view of minority jurors – which ultimately could be by race, ethnicity, or gender – appear no less applicable to the military justice system than to state criminal justice systems.

82 M.J. at 591 (Gaston, S.J., concurring).

Notably, when an accused elects trial by members, the default is an officer panel. When the accused is an officer, he or she is informed he will be tried by "commissioned (and/or warrant) officers." Benchbook at para. 2-1-3. If the military accused is enlisted, he or she is informed that he or she "may request the members of the court be comprised entirely of officers, that is commissioned and/or warrant officers, or at least one-third enlisted members." *Id*. If a servicemember does not request enlisted members, his or her court "shall be compromised of [officer] members in accordance with the convening order." *Id*.

According to a Department of Defense [DoD] report published in December 2020:

> Overall, the active component officer population is *less diverse* than the eligible civilian population. Blacks/African Americans, Hispanics, and Asians are *all underrepresented* compared with the eligible population. . . . Notably, the officer corps is *significantly less racially and ethnically diverse* than the enlisted population, for both the active and Reserve Components. Similarly, the civilian population eligible for commissioning as an officer is *much less racially and ethnically diverse* than the population eligible for serving as an enlisted member.[12]

In the military justice system, the views of 25% of the members can be ignored by their fellow members. This reality and its attendant perception of unfairness and racial bias undermines confidence in and respect for the military justice system.[13] Given the fundamental nature of the right espoused in *Ramos*, and the concerns that minority opinions will be discounted on non-unanimous court-martial panels – especially when the population of eligible panel members is already less racially and ethnically diverse than the eligible civilian population –

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[12] Department of Defense Board on Diversity and Inclusion Report: Recommendations to Improve Racial and Ethnic Diversity and Inclusion in the U.S. Military, Executive Summary at viii, available at https://media.defense.gov/2020/Dec/18/2002554852/-1/-1/0/DOD-DIVERSITY-AND-INCLUSION-FINAL-BOARD-REPORT.PDF (last accessed on Aug. 11, 2022) (emphasis added).

[13] Additionally, equal protection concerns may arise due to a convening authority's selection of a servicemember's panel members at the outset of court-martial. This Court recently granted review of an equal protection claim where an appellant asserted that the convening authority used a non-neutral member selection process, resulting in an all-white panel for the appellant, a minority accused, facing serious charges. *United States v. Jeter*, 81 M.J. 791 (N-M. Ct. Crim. App. 2021), *rev. granted*, 2022 CAAF LEXIS 327 (May 3, 2022).

this Court should find that unanimous verdicts are constitutionally required in the military in order to ensure equal protection under the law.

Fourth, the military's evolution does not require a non-unanimous verdict. Courts-martial are not conducted adjacent to battlefields, and military necessity today does not require such tribunals be held near foxholes. Modern technology and logistics can overcome the hurdles that once caused unnecessary delays in courts-martial. There can hardly be any suggestion that non-unanimous verdicts are critical to military exigency, at least not in the normal circumstances attendant to modern courts-martial. Indeed, it is inconvenient for courts-martial to be delayed based upon witness availability and these delays have tangential impacts on the efficiency and efficacy of our mission. But to not require in-person cross-examination of adverse witnesses in courts-martial on the grounds of "the military is different" would violate the Sixth Amendment Confrontation Clause.

Finally, as the Oregon Supreme Court recently recognized, "*Ramos* does not imply that the Sixth Amendment prohibits acquittals based on non-unanimous verdicts or that any other constitutional provision bars Oregon from accepting such acquittals." *State v. Ross*, 367 Ore. 560, 573 (2021). Therefore, to the extent that the Government argues that a parade of horribles will plague the military justice system by virtue of requiring unanimity (*e.g.*, unlawful influence in the deliberation room, panel member anonymity, inefficiency due to hung juries, a

threat to the finality of verdicts, etc.), this is a parade of strawmen. The military justice system already has discounted the legitimacy of some of these fears in capital courts-martial which require unanimity. Consistent with *Ross*, the military justice system can legitimately proceed with its present system allowing for non-unanimous acquittals so long as it requires a unanimous conviction.

In *Pritchard*, the Army CCA dismissed an equal protection argument because of concerns that "unanimous verdicts would unduly impede the efficiency of military operations. That is to say, deliberations towards unanimous verdicts are likely to take longer to achieve, thereby keeping participants from the military duties for greater periods of time." 2022 CCA LEXIS 349, at *10 (citation omitted). In relying on a 1916 statement made thirty-four years before the UCMJ was enacted in 1950, the Army CCA deliberately chose a World War I lens from which to view military efficiency in courts-martial rather than a modern view of courts-martial. The Army CCA was concerned about "hung jury results," in which "the command is faced with the prospect of either engineering a retrial or returning a service member with unresolved charges to its ranks." *Id*. at *13. The Army CCA presumed that "[v]erdicts with a three-fourths majority" would be reached more quickly and provide finality. *Id*.

The Army CCA fundamentally misunderstood the issue: the issue is whether a *conviction* requires a unanimous verdict. Appellant does not assert that

an acquittal in the military justice system requires a unanimous vote. A vote to acquit because the Government failed to prove an accused's guilt beyond a reasonable doubt will result in an acquittal and not a hung jury. Next, the Army CCA dropped a footnote in which it declared that "we are unaware of any other court in the country where a single vote for acquittal results in an acquittal." *Id*. at *13, n. 9. Even if the Army CCA is correct, as Justice Gorsuch so aptly stated, "it is something else entirely to perpetuate something we all know is wrong only because we fear the consequences of being right." *Ramos*, 140 S. Ct. at 1390. Regardless of whether a court-martial panel's verdict results in a hung jury or an acquittal, Appellant asserts that the issue before this Court is that there is no other court in the country where a non-unanimous verdict results in a conviction.

Appellant does not contend that he is entitled to every constitutional guarantee enshrined within the jury trial right. It would be untenable for the military to require a cross-section of the population from the state and district where the crime occurred to sit as panel members. Congress has reached an appropriate balance in this regard given the impracticability of such a requirement in the military context where individuals retain their domiciles and travel throughout the nation or overseas on a regular basis. Unlike the right to a unanimous verdict, the right to a fair cross-section of individuals from a particular

state/district is not "inextricably interwoven" with the burden of proof required by the Fifth Amendment.

Ramos makes clear that unanimity is central to the underlying impartiality, or fairness, of a criminal proceeding in any forum in the United States, whether state, federal, or military. If unanimity is central to impartiality and fairness, then Appellant had a due process right to a unanimous guilty verdict.

4. Appellant was entitled to a unanimous verdict because this right is a fundamental constitutional right under the Fifth Amendment Equal Protection Clause.

Under the Fifth Amendment, an equal protection violation is "discrimination that is so unjustifiable as to violate due process." *United States v. Akbar*, 74 M.J. 364, 406 (C.A.A.F. 2015) (citation and quotation marks omitted). In *Santiago-Davila*, this Court's predecessor wrote, in the context of a *Batson* challenge, that "the right to equal protection is a part of due process under the Fifth Amendment . . . and so it applies to courts-martial, just as it does to civilian juries." 26 M.J. at 389.

The Equal Protection Clause protects against arbitrary government distinctions based on suspect classifications or the encroachment or denial of fundamental rights. *United States v. Means*, 10 M.J. 162, 165 (C.M.A. 1981). "The Equal Protection Clause is generally designed to ensure that the Government treats 'similar persons in a similar manner.'" *United States v. Gray*, 51 M.J. 1, 22

(C.A.A.F. 1999). Civilians and servicemembers are similarly situated when they are "in all relevant respects alike." *Begani*, 81 M.J. at 280 (citation omitted). Other definitions of similarly situated utilized by the various Federal Courts of Appeal include the following: "'identical or directly comparable in all material aspects' or 'prima facie identical' or even a more 'colloquial' phrasing of 'apples to apples.'" *United States v. Begani*, 79 M.J. 767, 777 (N-M. Ct. Crim. App. 2020), *aff'd*, 81 M.J. 273 (C.A.A.F. 2021).

Government action that treats individuals differently with respect to a fundamental right triggers strict scrutiny review. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Strict scrutiny analysis requires the Government to prove that the challenged statute is narrowly tailored to achieve a compelling government interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Where there is no suspect classification or the implication of a fundamental right, the Government's action need survive only rational basis review which requires a rational basis for the distinction between similarly situated individuals. *United States v. Hennis*, 77 M.J. 7, 10 (C.A.A.F. 2017).

Ramos and *Edwards* established that a unanimous verdict is a fundamental right. The Supreme Court overruled existing precedent with a momentous and consequential decision that guaranteed defendants in state criminal proceedings the same right to unanimous verdicts as guaranteed to defendants in federal criminal

proceedings. The six-justice majority in *Edwards* twice described *Ramos* as a "landmark" decision. 141 S. Ct. at 1559, 1561. In dissenting from the majority's decision in *Edwards*, which failed to apply *Ramos* retroactively, Justice Kagan stressed that six-justice majority was in complete accord with the dissenting justices' view of how *Ramos* fundamentally altered the criminal justice landscape. She called *Ramos* a "fundamental change in the rules thought necessary to ensure fair criminal process" and reiterated that the majority extolled the ancient foundations of the jury rule, the bedrock role of the unanimous jury in American criminal courts, how unanimity ensures fairness in criminal trials and protects against wrongful verdicts, and how unanimity safeguards the jury system from racial prejudice. 141 S. Ct. at 1574, 1578 (Kagan, J., dissenting).

If unanimous guilty verdicts are necessary in the civilian criminal justice system "to ensure impartiality," per *Ramos*, then it follows that they are equally necessary to achieve the same result in a court-martial. Following *Ramos* and *Edwards*, there is no doubt that the landmark right to a unanimous verdict is a fundamental right. Because unanimity is central to the underlying fairness of a criminal proceeding in all state and federal courts, it is likewise central to the underlying fairness of a court-martial.

The CCA found that the military's non-unanimity requirement "does not implicate a suspect classification." JA at 023. The CCA further concluded that "a

servicemember standing trial in a court-martial is not similarly situated to a civilian accused in this respect, and the unanimity requirement announced in *Ramos* is not a 'fundamental right' afforded to the former." JA at 023. These conclusions are incorrect, especially given that the CCA reached these conclusions without any reference to *Edwards.* JA at 022-023.

In discussing the law relating to equal protection, the CCA cited to this Court's holding in *Akbar*. JA at 022. In *Akbar*, this Court "[did] not find any unjustifiable discrimination because Appellant, as an accused servicemember, was not similarly situated to a civilian defendant." 74 M.J. at 406 (citing *Parker v. Levy*, 417 U.S. 733, 743 (1974)).[14] However, because Akbar's case was referred capitally and his panel adjudged the death penalty, his panel was required to return findings by a unanimous verdict. RCM 1004; *Akbar*, 74 M.J. at 371. Therefore, by virtue of his offenses, Akbar was granted the right to a unanimous verdict, a right that all other military members charged with non-capital crimes are denied.

Furthermore, *Akbar* was decided in 2015, three years prior to the Supreme Court's holding in *Ortiz*, 138 S. Ct. 2165. Conspicuously absent from the CCA's

[14] The Supreme Court's holding in *Parker* is unsurprising, given the nature of the offenses at issue. The appellant in that case was charged with three military specific offenses: willfully disobeying a superior commissioned officer, conduct unbecoming of an officer and a gentleman, and disorders and neglects to the prejudice of good order and discipline in the armed forces, in violation of Articles 90, 133, and 134, UCMJ. 417 U.S. at 737-38.

opinion is any mention of *Ortiz*. JA at 022-023. Notably, another CCA judge came to the opposite conclusion as the panel in the instant case concerning the nature of the right at issue in *Ramos*. *See Westcott*, 2022 CCA LEXIS 156, at *126 (Meginley, J., dissenting). "[T]he right to a unanimous verdict is a fundamental constitutional right, as articulated in *Ramos*." *Id*. at *126 (Meginley, J., dissenting). Unlike the CCA here, Judge Meginley reached his conclusion via *Ortiz*.

"The procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal." *Ortiz*, 138 S. Ct. at 2174. "[T]rial-level courts-martial hear cases involving a wide range of offenses, including crimes unconnected with military service; as a result, the jurisdiction of those tribunals overlaps substantially with that of state and federal courts." *Id*. at 2170 (citations omitted). Indeed, military courts now "closely resemble[] civilian structures of justice," so much so that the military justice system is judicial in nature, and not merely, or even primarily, a tool to ensure good order and discipline. *Id*. at 2174. "Each level of military court decides criminal 'cases' as that term is generally understood, and does so in strict accordance with a body of federal law (of course including the Constitution)." *Id*. A court-martial panel "decide[s] questions of the most momentous description, even life itself." *Id*. at 2175. If the Supreme Court finds that the procedural

protections between military and civilian accused are "virtually the same," and the role of a panel or jury as the trier of fact is the same, all in accordance with the Constitution, then certainly a military accused and a civilian defendant are similarly situated – all the more so when they can be tried for the same offenses and especially so when the same accused could be tried in either civilian or military court.

While there are some vocabulary and minor procedural differences between a court-martial and a civilian criminal trial, the fundamental role of a "panel" and a "jury" is precisely the same: to be the trier of fact. Both the military justice and civilian justice systems depend on a group of persons who serve as the final arbiter of fact and the truth-seekers in a criminal proceeding. Both panel members and jurors are tasked with weighing the credibility of witnesses and determining the facts. Furthermore, if the procedural protections provided to an accused are virtually identical to a civilian defendant and the punishments adjudged by a court-martial are similar to those adjudged in civilian criminal trials, servicemembers are similarly situated to civilian defendants. This is especially notable because courts-martial "can try service members for a vast swath of offenses, including *garden-variety crimes unrelated to military service*," such that servicemembers and civilian defendants are "identical or directly comparable in all material respects." *Ortiz*, 138 S. Ct. at 2174 (emphasis added); *Begani*, 79 M.J. at 777.

As *Ortiz* explained, and Judge Meginley highlighted, servicemembers may be tried for offenses that no longer have a military connection. 138 S. Ct. at 2174; 2022 CCA LEXIS 146, at *132 (Meginley, J., dissenting). The Government alleged that Appellant committed two specifications of attempted sexual abuse of a child in violation of Article 80, UCMJ. JA at 027. Likewise, the appellant in *Causey*[15] was accused of two specifications of attempted sexual abuse of a child and one specification of attempted wrongful receipt of child pornography in violation of Article 80, UCMJ. 82 M.J. 574. Unlike the military specific offenses in *Parker*, attempted sexual abuse of a child and attempted receipt of child pornography are not unique to military law, nor are these offenses related to the appellants' military service.

Similarly, the appellant in *United States v. Veerathanongdech*[16] was not charged with military specific offenses. He was charged with wrongful use of a controlled substance, soliciting others to provide him a controlled substance, and obstruction of justice. No. ACM 40005, 2022 CCA LEXIS 218, at *1 (A.F. Ct. Crim. App. Apr. 12, 2022) (unpub. op.), *rev. granted*, 2022 CAAF LEXIS 533 (C.A.A.F. Jul. 25, 2022).[17] Drug offenses, solicitation – an inchoate offense – and

[15] The appellant's rate was Aviation Boatswain's Mate (Aircraft Handler) [ABH].
[16] The appellant's rank was Captain [Capt].
[17] JA at 190.

obstruction of justice are not unique to military law, nor were they related to the accused's military service.

From an equal protection standpoint, perhaps most significant is the situation presented in *United States v. Martinez*, No. ACM 39973, 2022 CCA LEXIS 212 (A.F. Ct. Crim. App. Apr. 6, 2022) (unpub. op.), *rev. granted*, 2022 CAAF LEXIS 562 (C.A.A.F. Aug. 3, 2022).[18] There, the accused was convicted of wrongful use of marijuana, communicating a threat, wire fraud, and attempted wire fraud in violation of Articles 112a, 115, and 134, UCMJ. *Id*. at *1-2. The accused's alleged wrongful use of marijuana is not unique to military law, nor was it related to his military service. The same is true of the allegation that he communicated a threat to injure the reputation of one of his alleged victims. *Id*. at *12-13. This type of conduct, which occurred at Hurlburt Field, Florida, is criminalized through state statues. *See* FLA. STAT. ANN. § 836.05 (2020).

The wire fraud allegation was charged pursuant to Article 134, clause 3, as a violation of federal law under 18 U.S.C. §1343. *Id*. at *16. The attempted wire fraud allegation was charged pursuant to Article 80, UCMJ, with the intended offense identified as wire fraud, in violation of 18 U.S.C. §1343. *Id*. at *18-19.

The elements of Article 134, clause 3, are: (1) that the accused did or failed to do certain acts that satisfy each element of the federal statute (including, in the

[18] JA at 155.

case of prosecution under 18 U.S.C. §13, each element of the assimilated State, Territory, Possession, or District law); and (2) that the offense charged was an offense not capital. Manual for Courts-Martial, United States, (2019 ed.) [2019 MCM], pt. IV, ¶91.b.(3). Clause 3 offenses involve noncapital crimes or offenses which violate federal civilian law, including law made applicable through the Federal Assimilative Crimes Act. If any conduct of this nature is specifically made punishable by another article of the UCMJ, it must be charged as a violation of that article. *Id*. at ¶91.c.(1). Thus, there are limitations on Article 134. "The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132." *Id*. at ¶91.c.(5)(a).

To convict the accused of the wire fraud specification, the Government needed to prove the following elements:

> (1) at the time and place alleged, the accused devised a scheme to defraud AL to obtain property by materially false and fraudulent pretenses and representations; to wit: impersonating AW to obtain nude photographs;
>
> (2) that the accused acted with the intent to defraud; and
>
> (3) in advancing, furthering, or carrying out the scheme, the accused transmitted any writing, signal, or sound by means of a wire communication in interstate commerce in violation of 18 U.S.C. §1343, an offense not capital.

2022 CCA LEXIS 212, at *16.

To convict the accused of the attempted wire fraud specifications involving AW and GMV, in violation of Article 80, UCMJ, the Government needed to prove the following elements:

> (1) at the time and place alleged, the accused did certain overt acts, inter alia contacting AW and GMV and attempting to deceive AW and GMC into sending nude photographs by impersonating AL;
>
> (2) that the acts were done with the specific intent to commit wire fraud;
>
> (3) that the acts amounted to more than mere preparation; and
>
> (4) that the acts apparently intended to effect the commission of the intended offense [of wire fraud] except that AW and GMV did not send nude photographs to the accused which prevented completion of the offense.

Id. at *18-19.

The Government is prohibited from charging an accused with a federal civilian offense under Article 134, clause 3, when the conduct at issue is "specifically made punishable by another article of the UCMJ." 2019 MCM, pt. IV, ¶91.c.(1). Given this prohibition, the Government's decision to charge Airman [Amn] Martinez with the offense of wire fraud (and attempted wire fraud) in violation of 18 U.S.C. §1343 demonstrated that it believed his conduct was not "punishable by another article of the UCMJ." *See id*. Instead, the Government

alleged, and obtained convictions, for mail fraud and attempted mail fraud. 2022 CCA LEXIS 212, at *1-2.

To find Amn Martinez guilty of mail fraud and attempted mail fraud, the military judge instructed his eight-member panel that a conviction required a three-fourths concurrence, or six of eight votes to convict. 2022 CCA LEXIS 212, at *3; Article 52(a)(3), UCMJ. If Amn Martinez had been tried in federal district court on the same allegations, he could not have been convicted unless his twelve-person jury was unanimous. Under any definition of similarly situated, Amn Martinez – a servicemember tried at a court-martial – was similarly situated to a civilian defendant. Based on the nature of his charges – mail fraud under 18 U.S.C. §1343 – Amn Martinez was "in all relevant respects alike"[19] or "identical or directly comparable in all material respects," to a civilian defendant facing the same charges in federal district court. *Begani*, 79 M.J. at 777. His charges were "prima facie identical" to a civilian defendant's wire fraud charges as they would both be facing charges alleging a violation of the same federal civilian statute. *Id*. Finally, in comparing Amn Martinez's wire fraud charges to that of a civilian defendant's wire fraud charges brought in federal district court, this Court is comparing "apples to apples." *Id*.

[19] *Begani*, 81 M.J. at 280 (citation omitted).

While Amn Martinez was charged with wire fraud in violation of 18 U.S.C §1343, other servicemembers may be court-martialed for "a vast swath of offenses, including garden-variety crimes unrelated to military service." *Ortiz*, 138 S. Ct. at 2174. That is exactly what happened to Appellant, ABH Causey, and Capt Veerathanongdech. When servicemembers are not charged with military specific offenses, but are instead charged with "garden-variety" offenses, they may be tried in state court upon state charges. This is especially true when a servicemember's alleged offense(s) occur off-base, as was the case in *Westcott*, where the accused's crimes occurred in North Carolina and officials of that state ceded jurisdiction to military authorities. 2022 CCA LEXIS 156, at *132 (Meginley, J., dissenting). Had the accused been tried in a North Carolina court, he was entitled to a unanimous verdict. *Id*. "In other words, he had at least one less fundamental right in the military than had he been tried in North Carolina. *Id*.

Under strict scrutiny review, the fundamental right to a unanimous verdict must be narrowly tailored to serve a compelling Government interest. There is no compelling interest in denying the fundamental right of a fair and impartial panel to servicemembers merely based on their service to the United States. In *United States v. Mayo*, the Army CCA pontificated about potential compelling Government interests in a non-unanimous panel verdict:

> [C]urrent practice helps reduce the possibility of impermissible influences on panel members both inside

> and outside the panel deliberation room. These pernicious concerns of improper influence will be mostly acutely felt when the case involves high stakes, when the case involves infamous acts, or when the personalities involved are less likely to yield to prophylactic instructions. That is, concerns of improper influence are most likely to be a problem in the most problematic of circumstances.

ARMY 20140901, 2017 CCA LEXIS 239, at *22 (A. Ct. Crim. App. Apr. 7, 2017) (unpub. op.).[20]

This pre-*Ramos* decision reflects a concern about unlawful command influence. "Perhaps the Government thus has an interest in nonunanimous panels, but the law concerning unlawful command influence is – supposedly – in place to protect an accused. . . . . [T]he *Mayo* rationale as justification to deny servicemembers the right to a unanimous jury should give anyone pause about the fairness of the military justice system." *Westcott*, 2022 CCA LEXIS 156, at *129 (Meginley, J., dissenting). This is especially true because Article 37, UCMJ, 10 U.S.C. § 837(a)(1), prohibits unlawful command influence by the convening authority, any commanding officer, any panel member, and the military judge. To ensure these concerns are alleviated from the start – during voir dire and before the members are empaneled to serve on a servicemember's court-martial – the military judge asks the following question: "Is any member of the court in the rating chain, supervisory chain, or chain of command, or any other member?" Benchbook at

[20] JA at 171.

para. 2-6-2. If this question is answered affirmatively, the military judge asks additional questions to ensure that any affected members feel they will be free to express their opinion and disagree with any other member of the panel, including those who are superior or subordinate to another panel member. *Id*. Moreover, the military judge instructs the members that "the influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment." Benchbook at para. 2-5-14.

If, pursuant to Article 25, the convening authority selects the "best qualified" members for the duty, Article 37(a)(1) prohibits unlawful command influence, and the military judge instructs the members not to influence other members by virtue of superior rank, then there should be no concern about unlawful command influence in the deliberation room. This concern, touted as a reason for non-unanimous verdicts, is, or should be, nonexistent in the deliberation room. Thus, the military courts' general concern about unlawful command influence in the deliberation room and the CCA's specific concern here is a fallacy. Indeed, this Court has already addressed this matter: "Where the vote is unanimous, [the] concerns about command influence would appear to be unfounded." *United States v. Loving*, 41 M.J. 213, 296 (C.A.A.F. 1994).

Justice Kavanaugh's concurring opinion in *Ramos* notes:

> Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The 10 jurors "can simply ignore the views of their fellow panel members of a different race or class."

Ramos, 140 S. Ct. at 1418 (Kavanaugh, J., concurring in part) (citation omitted).

In his *Westcott* dissent, Judge Meginley refuted many of the other potential reasons to preserve non-unanimous verdicts. Regarding the finality of a verdict preventing hung juries, Judge Meginley noted that this is only an issue if either the Constitution or congressional legislation requires a unanimous vote to acquit. 2022 CCA LEXIS 156, at *131 (Meginley, J., dissenting) (citation omitted). Regarding expedience, Judge Meginley observed:

> cases generally take much longer to get to trial than they did in 1950, especially when scientific testing of evidence is involved; it is not uncommon for a case to proceed to trial a year after the offense was committed. Regarding the procurement of members, this may have been a significant issue in 1950, but is not so in 2022, as it is not uncommon to travel servicemembers to sit on panels at other installations. . . . Having considered these possible reasons, none warrant denial of equal protection regarding a unanimous verdict when viewed in context of the consequences of such a verdict.

Id.

Federal courts are in "wide agreement that convictions by general courts-martial receive the weight of equivalent convictions in the civilian system." *Gourzang v. AG United States*, 826 F.3d 132, 137 (3d Cir. 2016); *see also United*

States v. Grant, 753 F.3d 480, 484-85 (4th Cir. 2014) (holding that a conviction by general court-martial can qualify as a predicate offense under the Armed Career Criminal Act); U.S.S.G. § 4A1.2(g): Definitions and Instructions for Computing Criminal History ("Sentences resulting from military offenses are counted if imposed by a general or special court-martial."). Servicemembers sentenced to confinement by a court-martial may be confined at a civilian institution so long as they are "subject to the same discipline and treatment" as civilians in that institution. Article 58, UCMJ, 10 U.S.C. § 858. In *United States v. McPherson*, this Court reiterated the plain meaning of Article 58, UCMJ, when it wrote, "[m]ilitary confinees can – and must – receive treatment equal to civilians confined in the same institution." 73 M.J. 393, 396 (C.A.A.F. 2014)

Servicemembers convicted at courts-martial may be subject to various post-trial proceedings and requirements, including DNA processing required under 10 U.S.C. § 1565 and Department of Defense Instruction [DoDI] 5505.04, firearms prohibitions under 18 U.S.C. § 922, domestic violence ramifications under 18 U.S.C. § 922(g)(9), and sex offender notification requirements, under DoDI 1325.07. *Westcott*, 2022 CCA LEXIS 156, at *135 (Meginley, J., dissenting). The firearms prohibition is particularly problematic for servicemembers whose Second Amendment right to keep and bear arms can be stripped because of convictions for

a multitude of offenses and whose military duties may require him or her to bear arms.

Of the aforementioned requirements, Appellant is subject to all but the domestic violence ramifications. JA at 033. Because of his conviction, Appellant is required to register as a sex offender in the state where he lives pursuant to the Sex Offender Registration and Notification Act, [SORNA], 34 U.S.C. § 20901 et seq. Judge Meginley noted that "SORNA considers a military conviction equal to a federal or state conviction. If a servicemember is denied a unanimous panel, it is not equal." *Wescott,* 2022 CCA LEXIS 156, at *136.

Had Appellant been prosecuted for the same offense of attempted sexual abuse of a child in state or federal court with the right to a unanimous verdict, then he and a civilian prosecuted for the same offense would be similarly situated because both would be subject to the same SORNA requirements. If, however, Appellant was convicted at a court-martial, as he was, and the hypothetical civilian was convicted in a civilian court for the same offense, the civilian defendant would have the fundamental right to a unanimous verdict. Appellant, denied this right, could have been convicted by as few as six members. JA at 131; Article 52(a)(3), UCMJ. Had Appellant been tried at a special court-martial, he could have been convicted by as few as three people. Article 16(c)(1), UCMJ; Article 52(a)(3), UCMJ. Both Appellant and the hypothetical civilian would be subject to the same

SORNA requirements. This is not the equal protection of the laws. Judge Meginley opined, "I am convinced that servicemembers and civilians are similarly situated for purposes of equal protection analysis when it comes to evaluating nonunanimous verdicts and their consequences under SORNA." 2022 CCA LEXIS 156, at *137.

Even under a rational basis test, the non-unanimous convictions authorized by Article 52(a)(3) cannot stand. A rational basis suffices for treating similarly situated people differently. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57, 80 (1981) (asking whether the disparate treatment is "not only sufficiently but closely related" to Congress' purpose in legislating); *Akbar*, 74 M.J. at 406 ("equal protection is not denied when there is a reasonable basis for a difference in treatment") (internal citation omitted). In *Ramos*, the Supreme Court explained that "a jurisdiction adopting a nonunanimous jury rule even for benign reasons would still violate the Sixth Amendment." 140 S. Ct. at 1440, n. 44. No benign purpose exists here.

Finally, this Court need not wait for Congress or the Supreme Court to apply *Ramos* to courts-martial. After the Supreme Court's ruling in *Batson*, this Court's predecessor held that *Batson* extended to courts-martial by virtue of equal protection as guaranteed by the Fifth Amendment Due Process Clause. *Santiago-Davila*, 26 M.J. 380. Likewise, in *United States v. Tempia*, 16 C.M.A. 629, 631

(C.M.A. 1967), this Court's predecessor held that the principles established in *Miranda*,[21] applied to military interrogations of criminal suspects. As with *Ramos*, *Miranda* involved a state court defendant, not a military accused. *See Tempia*, 16 C.M.A. at 635. In finding that *Miranda's* Fifth Amendment privilege against self-incrimination was applicable to military interrogations, this Court's predecessor noted that "the subsequent case of *Johnson v. New Jersey*[22] . . . repeatedly referred to the new [*Miranda*] standards as 'constitutional rules of criminal procedure,' the 'prime purpose' of which 'is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of justice.'" 16 C.M.A. at 635. After all, "the views of 'the Supreme Court of the United States on constitutional issues' are binding on [this Court]." *Id*.

Here, Article 52(a)(3) was enacted before *Ramos*, when *Apodaca* was still in effect. Just as in *Santiago-Davila* and *Tempia*, this Court should apply *Ramos* to courts-martial to guarantee every military accused the same fundamental right afforded to every other defendant in the United States: the right to a unanimous guilty verdict because unanimity is central to the fairness of a trial and the reliability of a guilty verdict.

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[21] *Miranda*, 384 U.S. 436.
[22] 384 U.S. 719 (1966).

***

Until the right to a unanimous guilty verdict is guaranteed to servicemembers tried by courts-martial, each servicemember who takes an oath to support and defend the Constitution is denied a fundamental Constitutional right guaranteed to every defendant accused of a crime in state and federal court. As such, justice in the military justice system erodes with every non-unanimous verdict. This Court can, and should, ensure that servicemembers are guaranteed the same Constitutional rights they support and defend for their civilian brethren.

Prayer for Relief

WHEREFORE, appellant respectfully requests this Honorable Court set aside and dismiss the findings and sentence and restore all rights, property, and privileges to Appellant.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Appellate Defense Division, the Appellate Government Division, and the Air Force Court of Criminal Appeals on August 24, 2022.

CERTIFICATE OF COMPLIANCE WITH RULES 21(B) AND 37

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 13,489 words, not including the index and authorities and the certificates of counsel.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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